

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Income Tax Appeal No. 122 of 2001

(Old No. 131 of 2000)

The Commissioner of Income Tax

Bareilly and another

.....

Appellants

Versus

M/s Almora Magnesite Limited

Magnesite House, Almora

.....

Respondent.

Mr. S.K. Posti, Advocate for the appellants

Mr. Vikram Gulati, Advocate for the respondent.

**Coram: Hon'ble S.H. Kapadia, C.J.,
 Hon'ble Rajesh Tandon, J.**

Date: 16.09.2003:

ORAL JUDGMENT [Per Hon. S.H. Kapadia, C.J.]

Being aggrieved by the decision of the Tribunal deleting the penalty imposed by the Assessing Officer, the department has filed this appeal under section 260 A of the Income Tax Act.

The appeal is in respect of the Assessment Year 1988-89.

The question which we are required to answer in this appeal is as follows:

“Whether the Tribunal was right in deleting the penalty imposed by the A.O. under section 273(1)(b) of the Income Tax Act for the Assessment year 1988-89?”

The assessee filed its return of income on 29.06.1988 declaring a loss of Rs. 1,52,15,207/-. The assessment was completed under section 143(1)(a). The total income was determined at Rs.4,92,501/- after giving effect to section 115 of the Income Tax Act. The A.O. issued notice under section 273(1)(b) of the Income Tax Act on the ground that the assessee has failed to submit estimate of advance tax under form no. 29. The A.O., therefore, imposed penalty of Rs.50,000/-. According to the A.O., the assessee failed to file the estimate of advance tax under section 209 A of the Income Tax Act. He, therefore imposed penalty of Rs. 50,000/-. Being aggrieved, the assessee went in appeal to Commissioner of Income Tax (Appeals).

The appeal was allowed on the ground that assessee had filed form no. 29. The appellate Authority found that in the present case even before the assessee could appear on 11.12.1989, the A.O. passed penalty order under section 273(1)(b); that the assessee had no opportunity to satisfy the A.O.; that it filed form no. 29 declaring an income of Rs. 25,00,000/- against the carry forward loss of earlier years, which was set off resulting in net loss of Rs. 90,00,000/-. The Appellate Authority also found technical default on the part of the assessee in not filing the statement in form no. 28A and that instead of filing form no. 28A, the assessee had by mistake filed form no. 29. Therefore, the Appellate Authority deleted the penalty on the ground that the assessee had committed technical default; that there was no willful default on the part of the assessee. This finding has been confirmed by the tribunal. Therefore, the department has come by way of appeal.

Mr. Posti, Advocate appearing on behalf of the department argued that the matter should be remanded because the point taken by the assessee before the Appellate Authority was not there before the A.O. and that a new case was made out by the assessee before the Appellate Authority. This is the only argument advanced on behalf of the department.

We do not find any merit in this argument. Firstly we are concerned with the Assessment Year 1988-89. Secondly, the assessee has not made out a new case before the Appellate Authority. In the present matter proceedings under section 273(1)(b) were fixed for hearing on 19.12.1989 as per notice dated 6.12.1989, which was received by the assessee on 11.12.1989. However, before the assessee could appear before the A.O. on 11.12.1989, the order under section 273(1)(b) was passed by the Assessing Officer ex parte. This order was passed ex parte on 30.11.1989. Therefore, the assessee had no opportunity to put its case before the A.O. Therefore, it is not a case of a new point being raised by the assessee. Thirdly, in the present case, the Appellate Authority and Tribunal have come to the

conclusion concurrently that there was no willful default on the part of the Assessee. In the case of Hind Products Pvt. Ltd. Vs. Commissioner of Income Tax Bombay City-1 reported in 121 I.T.R. page 903, it has been held that the estimate of advance tax required to be filed under the Income Tax Act must show estimated income for the relevant year. Estimated income may not be the same as ultimate reported income. Merely because at the end of the year an assessee is shown to have earned income, which is more than estimated income, it will not make the estimate untrue. In the present case, the Appellate Authority and the Tribunal have come to the conclusion that there was no willful default on the part of the assessee. This is a concurrent finding.

In the circumstances, the appeal is dismissed. No order as to costs.

(Rajesh Tandon, J.)

(S.H. Kapadia, C.J.)

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